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21488—37

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GEORGE W. ELKINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above cause on July 21, 1937, reversing the decision of the United States Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 387–392) has not yet been reported. The opinion of the Board of Tax Appeals (R. 87–100) is reported at 33 B. T. A. 127.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 21, 1937. (R. 392–393.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The taxpayer received dividends upon capital stock in certain British corporations. Such dividends were declared and paid either "less tax" or "free of tax." The dividend warrants were accompanied in each instance by certificates, required by British law, certifying that all British and United Kingdom income taxes due on the profits of which the dividends formed a portion had been or would be paid by the corporation to the proper officer for the receipt of taxes. The certificate further indicated that the dividend payment was equivalent to a gross dividend less income tax "appropriate thereto" at the current rate in the case of a dividend "free ~~from~~ tax", or that the warrant represented the net amount of a gross dividend less income tax "appropriate thereto" at the current rate in the case of a dividend "less tax".

1. The principal question is whether the amounts shown on the certificates accompanying dividend payments as taxes "appropriate to" such dividends may be taken as a credit against the Federal income tax, as income taxes paid or accrued to a foreign country within the meaning of Section 131

(a) of the Revenue Act of 1928, subject to the limitation imposed by Section 131 (b), and whether any balance not available as a credit may be deducted from gross income under Section 23 (c) of that Act.

2. A cognate question, not specifically treated by the court below, is whether the amounts shown as taxes "appropriate to" such dividends should be added to the net amount actually received as dividends in determining the amount of gross income.

STATUTE INVOLVED

The statute involved is printed in the Appendix, *infra*, pp. 9–11.

STATEMENT

This proceeding involves a deficiency in Federal income tax asserted by the Commissioner of Internal Revenue against George W. Elkins, a citizen of the United States residing at Elkins Park, Pennsylvania, for the calendar year 1931. (R. 6, 11–14, 16.)

Throughout the year 1931, the taxpayer owned certain ordinary shares of capital stock in British-American Tobacco Company, Ltd., Imperial Tobacco Company (of Great Britain and Ireland), Ltd., and Tobacco Securities Trust Company, Ltd., all organized and existing under the laws of Great Britain, with their principal offices in England. He also owned certain deferred shares of stock in the last-named company. (R. 16.)

During 1931 these corporations declared and paid cash dividends upon their outstanding stock of the classes noted above, the rates and amounts thereof being stipulated in detail. (R. 17–20.) By communications transmitted to their shareholders, as required by British law, at the time the dividend warrants were transmitted, these companies certified to their shareholders that British income taxes and/or United Kingdom income taxes on the profits of the companies, of which the dividends formed a part, had been paid or would be paid by the company to the proper officer for the receipt of taxes. The dividends on stock in British-American Tobacco Company and Imperial Tobacco Company were declared and paid "free of tax", and the certificates transmitted to shareholders by those companies indicated that the dividends paid were equivalent to gross dividends of stated amounts less amounts shown as income taxes "appropriate thereto" computed at the prevailing rate. The dividends on stock in Tobacco Securities Trust Company were paid "less tax", and the certificates transmitted to its shareholders by that company indicated the gross amount of the dividend, the amount of income tax "appropriate thereto" at the prevailing rate, and the net amount for which the voucher was issued. (R. 17–20, 25–47, 53–67.)

The taxpayer actually received in cash during the year 1931, as dividends upon shares of stock

owned by him in the above corporations, sums which, when converted into United States money at prevailing rates of exchange, amounted to a total of $23,993.72. The certificates of the several companies accompanying his dividend warrants indicated that British and United Kingdom income taxes "appropriate to" such dividends at rates prevailing at the time amounted to a total of $7,017.11. (R. 17–22.)

In making his Federal income tax return for 1931, the taxpayer included in gross income as dividends received upon stock in the above foreign corporations the sum of $31,010.83, which amount represented the $23,993.72 net dividends received plus the $7,017.11 computed as United Kingdom and Dominion income tax "appropriate to" the so-called gross dividend. (R. 22, 77.) In computing the net tax due on his return, he claimed as a credit under Section 131 (a) of the Revenue Act of 1928 the sum of $9,207.02, being the above amounts aggregating $7,017.11 computed as taxes "appropriate to" the dividends received plus $2,189.91 actually paid to the British Crown during the year as a surtax. The amount actually claimed as a credit was $5,044.99, the balance of $4,162.03 being claimed as a deduction from gross income under Section 23 (c) of the Act. (R. 23, 77, 83–85.)

In auditing the taxpayer's return, the Commissioner of Internal Revenue eliminated the above

$7,017.11 from gross income and disallowed the credit of $5,044.99 and the deduction of $4,162.03. (R. 11–14, 23.) At the trial before the Board of Tax Appeals, he conceded that the sum of $2,189.91 paid to the Crown as surtax is properly allowable as a credit under Section 131 (a), *infra*. (R. 89.) With respect to the $7,017.11, however, the Board of Tax Appeals sustained his determination that this sum was not income and did not constitute taxes paid to a foreign government, within the meaning of Section 131 (a). (R. 88–100.) The Circuit Court of Appeals reversed the decision of the Board. (R. 392–393.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding and deciding that the sums aggregating $7,017.11 treated for the purposes of British income tax law as taxes "appropriate to" dividends received by the taxpayer upon shares of stock in British corporations constitute gross income to the taxpayer.

2. In holding and deciding that the above sums aggregating $7,017.11 constitute income, war-profits and excess-profits taxes within the meaning of Section 131 (a) of the Revenue Act of 1928.

3. In holding and deciding that the above sums aggregating $7,017.11 were "paid or accrued during the taxable year to any foreign country" within the meaning of Section 131 (a) of the Revenue Act of 1928.

4. In holding and deciding that the taxpayer is entitled to credit the above sums aggregating $7,017.11 against his Federal income tax for 1931, subject to the limitations of Section 131 (b), and in holding and deciding that he is entitled to deduct the excess of that credit from gross income under Section 23 (c) of the Revenue Act of 1928.

5. In holding and deciding that the above sums aggregating $7,017.11 represent income taxes paid to the British government by the corporations and borne directly by the taxpayer.

6. In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

This case was consolidated with the appeal of Mary Duke Biddle and three other persons for hearing and decision before the Board of Tax Appeals. (R. 87–88.) The five cases presented the same questions, save for dates and amounts, and were disposed of in one opinion. Mary Duke Biddle took an appeal to the Circuit Court of Appeals for the Second Circuit, which affirmed the decision of the Board of Tax Appeals, 86 F. (2d) 718. On the same facts and statement of evidence, except for dates and amounts, the court below reversed the decision of the Board, stating "We respectfully differ with the * * * conclusions [of Judge Manton, who wrote the opinion for the Second Circuit]." (R. 391.)

There is a direct conflict. The questions are of general importance. Certiorari was granted in

the *Biddle* case, No. 55, this Term, October 11, 1937. The Court should resolve the conflict.

CONCLUSION

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

OCTOBER 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(c) *Taxes generally.*—Taxes paid or accrued within the taxable year, except—

(1) income, war-profits, and excess-profits taxes imposed by the authority of the United States;

(2) so much of the income, war-profits, and excess-profits taxes imposed by the authority of any foreign country or possession of the United States as is allowed as a credit against the tax under section 131; and

(3) taxes assessed against local benefits of a kind tending to increase the value of the property assessed; but this paragraph shall

not exclude the allowance as a deduction of so much of such taxes as is properly allocable to maintenance or interest charges. For the purpose of this subsection, estate, inheritance, legacy, and succession taxes accrue on the due date thereof, except as otherwise provided by the law of the jurisdiction imposing such taxes, and shall be allowed as a deduction only to the estate.

SEC. 131. TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.

(a) *Allowance of credit.*—The tax imposed by this title shall be credited with:

(1) *Citizen and Domestic Corporation.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

(2) *Resident of United States.*—In the case of a resident of the United States, the amount of any such taxes paid or accrued during the taxable year to any possession of the United States; and

(3) *Alien Resident of United States.*—In the case of an alien resident of the United States, the amount of any such taxes paid or accrued during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country; and

(4) *Partnerships and Estates.*—In the case of any such individual who is a member of a partnership or a beneficiary of an estate or trust, his proportionate share of such taxes of the partnership or the estate or

trust paid or accrued during the taxable year to a foreign country or to any possession of the United States, as the case may be.

(b) *Limit on credit.*—In no case shall the amount of credit taken under this section exceed the same proportion of the tax (computed on the basis of the taxpayer's net income without the deduction of any income, war-profits, or excess-profits tax any part of which may be allowed to him as a credit by this section), against which such credit is taken, which the taxpayer's net income (computed without the deduction of any such income, war-profits, or excess-profits tax) from sources without the United States bears to his entire net income (computed without such deduction) for the same taxable year.

* * * * *

(e) *Proof of credits.*—These credits shall be allowed only if the taxpayer furnishes evidence satisfactory to the Commissioner showing the amount of income derived from sources without the United States, and all other information necessary for the verification and computation of such credits.

U. S. GOVERNMENT PRINTING OFFICE: 1937